

person who has been qualified under Mont. Code Ann. § 3-10-231(2) may be called as a substitute. When the sitting justice is on vacation or in training, and there is not another justice from the sitting justice's county, then a substitute is determined in the same manner as if the justice were sick or absent.

As a caveat, it should be noted that nothing in this opinion addresses or is intended to address the selection of a municipal court judge as a substitute or acting justice of the peace, or as a substitute or acting city judge.

THEREFORE, IT IS MY OPINION:

1. A substitute city court judge may be selected by the sitting city judge from a list of qualified persons regardless of the availability of another city judge or justice of the peace.
2. If a sitting justice of the peace has been disqualified pursuant to Mont. Code Ann. § 3-1-803 or -805, the substitute justice must be another justice of the peace and may not be someone who has qualified to act as a substitute justice under Mont. Code Ann. § 3-10-231(2). If the sitting justice of the peace is sick, disabled or absent, the substitute justice may be a person who has qualified under § 3-10-231(2), as long as another justice of the peace or a city judge is not readily available. If the sitting justice of the peace is on vacation or in training, the substitute justice is chosen in the same manner as if the justice were sick or absent, as long as there is not another justice of the peace from the county of the sitting justice.
3. In determining who is available to act as a substitute justice of the peace, the sitting justice may rely upon letters from other justices and city judges that they are unavailable. Such letters should not be relied upon indefinitely, however. After a reasonable time, as determined by the sitting justice, the justices and judges who wrote the letters should be contacted to determine if they are still unavailable.

Sincerely,  
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Attorney General

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procedure of providing law enforcement with a menu of substitutes from which to choose clearly violated Potter. The substitute Justice of the Peace was not duly authorized, thus the warrants issued by the substitute were void ab initio. *St. v. Vickers*, 1998 MT 201, 290 M 356, 964 P2d 756, 55 St. Rep. 859 (1998), distinguishing *U.S. v. Leon*, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405 (1984).

**Legal Qualifications of Justice of the Peace:** According to applicable statutes and the rules of the Commission on Courts of Limited Jurisdiction, before a person is legally qualified to serve as a substitute Justice of the Peace, the following requirements must be met: (1) within 30 days of taking office, the elected or appointed Justice of the Peace must create a list of persons who are qualified to act in the sitting judge's absence when no other Justice or City Court Judge is available; (2) the sitting Justice of the Peace must request and obtain from the Commission a waiver of training for the substitute judge and show that the substitute judge is of good moral character and has good community support, a sense of community standards, and a basic knowledge of court procedure; and (3) the substitute judge must be sworn in by the County Commissioners. (See 1997 amendment.) A search warrant issued by a substitute judge in a case in which these qualifications were not met was held to be void ab initio because the statutory procedures to make him a judge and to vest him with the power to perform judicial functions had not been followed. Evidence seized pursuant to the warrant was suppressed. *Potter v. District Court*, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

**Sitting Judge to Be Called Prior to Calling of Substitute Judge:** In addition to the legal qualifications of a substitute judge, a sitting Justice of the Peace must first attempt to call in another Justice of the Peace, if there is one readily available, or a City Court Judge before resorting to calling in a qualified substitute judge from the list of substitute judges. A search warrant issued by a substitute judge in a case in which this procedure was not followed was held to be void ab initio because the statutory procedures to make him a judge and to vest him with the power to perform judicial functions had not been followed. Evidence seized pursuant to the warrant was suppressed. *Potter v. District Court*, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

#### Attorney General Opinions:

**When Substitute Justice of the Peace May Be Called -- Reliance on Letters of Unavailability:** How a substitute Justice of the Peace is selected depends on the reasons for the absence of the sitting Justice of the Peace. If the sitting Justice of the Peace is disqualified pursuant to 3-1-803 or 3-1-805, only another Justice of the Peace may be called in and the substitute may not be a person qualified pursuant to subsection (2) of this section. If the sitting Justice of the Peace is sick, disabled, or absent, another Justice of the Peace or City Judge may be called in if available or a person may be called in who is qualified pursuant to subsection (2) of this section if another Justice of the Peace or City Judge is not readily available. If the sitting Justice of the Peace is on vacation or in training, the substitute is to be chosen in the same manner as if the sitting Justice of the Peace is sick, disabled, or absent, as long as there is not another Justice of the Peace from the county of the sitting Justice of the Peace. In determining who is available to act as a substitute, the sitting Justice of the Peace may rely on letters from other Justices of the Peace and City Judges that they are unavailable. However, after a reasonable time, the sitting Justice of the Peace should contact those who wrote the letters to determine if they are still unavailable. 48 A.G. Op. 11 (2000). See also 40 A.G. Op. 26 (1983), and *Potter v. District Court*, 266 M 384, 880 P2d 1319 (1994).

**County Residency Not Required of Acting Justice of the Peace:** An acting Justice of the



Peace who is called to act pursuant to this section and who is otherwise qualified to serve under 3-10-202 need not be a resident of the county where the court sits. 43 A.G. Op. 51 (1990).

**Authority to Select Substitute Justice of the Peace -- Substitution Choices:** A Justice of the Peace has the primary authority to select his substitute during temporary absences. In the event the justice is sick, disabled, or absent and is unable to call in a substitute, one may be called in by the County Commissioners. The Justice of the Peace or the County Commissioners must look to the following substitution choices: (1) another justice, if available; (2) a city judge; or (3) a qualified person from the list provided for in subsection (2) of this section. In the event the Justice of the Peace is on vacation or attending a training session, if there is no other justice in the county, the Justice of the Peace must look to the same substitution choices. 43 A.G. Op. 49 (1989).

**Qualifications for List of Temporary Substitute Justices:** In order to be eligible for the list of persons provided by a Justice of the Peace as temporary substitute justices, persons must meet the qualifications set forth in 3-10-202(2) and the residency requirements of 3-10-204. 42 A.G. Op. 4 (1987).

**No Requirement of Specific Length of Time of Absence of Justice Prior to Appointment of Substitute:** There is no specific length of time for which a regular Justice of the Peace must be absent before the County Commissioners can appoint an acting Justice of the Peace. (See 1985 amendment.) 40 A.G. Op. 26 (1983).

**Acting Justice Not to Be Appointed in Advance:** The Board of County Commissioners may not appoint an acting Justice of the Peace, in advance, to act whenever a Justice is sick, disabled, or absent. (See 1985 amendment.) 40 A.G. Op. 26 (1983).

**"Other Qualified Person" Not to Replace Disqualified Justice:** Prior to the 1985 amendment, in a county where there was only one Justice of the Peace and the Justice was disqualified under 3-10-231(1), a Justice from a neighboring county had to be called in as a replacement. Section 3-10-231 did not authorize calling in "some other qualified person" in this situation. 40 A.G. Op. 26 (1983).

**Collateral References:**

Criminal Law key 90; Justices of the Peace key 52, 53, 57.  
51 C.J.S. Justices of the **Peace** §§ 41, 47, 61.